IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louis Fassolla, charged as Louis Fosella,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

JOSEPH C. BURKE,
United States Attorney,
MACK MEADER,
Assistant U. S. Attorney,
Attorneys for Defendant in Error.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles

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The assignments of error by plaintiff in error are seven in number, the first six alleging error in various instructions of the court to the jury and the seventh alleging that the evidence was insufficient to support the verdict and the sentence imposed "in that the evidence shows a single unlawful act which is insufficient to support a verdict of guilty on more than one of the counts as laid in the information."

Without entering into any discussion of the merits of the first six assignments of error, we deem it sufficient to say that there was no exception taken to the court's charge to the jury. [Tr. p. 41.]

Taking up assignment of error number seven, to-wit: the assignment covering the insufficiency of the evi-

dence, we respectfully contend that counsel for plaintiff in error is under a misapprehension when he insists that there was only one sale in evidence in this case. Officer Jones in direct examination testified that in company with police officers Steckel, Jaffkey, McCarthy and Captain Pelletier, he arrested the occupants of an automobile which contained about one-half gallon liquor, at about nine o'clock on the evening of November 5th, which liquor was purchased from Louis Fossolla [Tr. pp. 18 and 19]. This is corroborated by the testimony of Officer Steckel [Tr. p. 22].

There is also evidence of the unlawful manufacture of the wine found on the premises of the defendant [Tr. pp. 25 and 26]. This is the direct testimony of plaintiff in error and it is contended that this fact is sufficient in itself to sustain a verdict of guilty on the third count of the information, to-wit: nuisance.

Plaintiff in error contends that the second count, alleging unlawful possession, is not supported by the evidence. We agree with counsel that the fact is undisputed that the liquor which was seized by the arresting officers was made by plaintiff in error in his own home. However, counsel's statement on page five of his brief, that "the presumption must be indulged, legally, for his own use and that of his *bona fide* guests" is not the law. Quoting from section 33 of article 2 of the National Prohibition Act,

> "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor, shall be *prima facie* evidence that such liquor is kept for the purpose of

being sold, etc., or otherwise disposed of, in violation of the provisions of this title."

We contend that the testimony of the plaintiff in error [Tr. pp. 25 and 26] to the effect that he manufactured this wine in September, 1920, which manufacture was unlawful, certainly brings it within the purview of that part of section 33 above quoted.

In support of the contention of defendant in error that the evidence was sufficient to maintain a verdict of guilty and a sentence on the third count of the information we respectfully refer to the case of Strada against the United States, 281 Federal, and Lewinsohn v. United States (C. C. A.) 278 Federal, 421-425, "the continuity of wrong doing implied in the charge of maintaining a nuisance may sufficiently appear from the nature and circumstances of a single transaction" in addition to the above we also contend that the case at bar is similar to the Strada case in that evidence was properly admitted and received to show at least one prior sale.

In addition we contend that the illegal manufacture of this wine by plaintiff in error in his own home [according to his own testimony, Tr. pp. 25 and 26] takes from his own home the character of a private dwelling, and makes it in part at least, a place of business, or some place other than the place which is used as his dwelling only.

The contention of the plaintiff in error that the provisions of the National Prohibition Act which declares the act of possession a crime is illegal and unconstitu-

tional and therefore void, we respectfully contend is erroneous.

Page *et al.* v. United States, 278 Fed. 41.

United States v. Dowling, 278 Federal 630, quoted at length by counsel for plaintiff in error, has no application to the case at bar for the reason that in this case facts are alleged and proven which accompany the mere fact of unlawful possession, to-wit: sales and manufacture, and the only portion of the quoted opinion which has any application here is, "the possession is unlawful unless it be coupled with illegal 'manufacture' or 'sale' or 'transportation' or 'importation' or 'exportation' ". (Brief of plaintiff in error, p. 10, l. 17.)

Summing up, therefore, defendant in error respectfully contends that the evidence was first, sufficient to support the verdict and sentence on the first count in that the sale as alleged was sufficiently proven; second, the evidence was sufficeint to support the verdict and sentence on the second count in that it was proven that liquor was unlawfully manufactured at the home of plaintiff in error, and more than one sale by the defendant was proven; and third, that the evidence of sales and manufacture was amply sufficient to support the verdict and sentence on the third count, i. e., that of maintaining a nuisance.

We submit that the judgment of conviction should be sustained.

JOSEPH C. BURKE,
United States Attorney,
MACK MEADER,
Assistant U. S. Attorney,
Attorneys for Defendant in Error.